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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/568,765	02/12/2007	Long Dang	001107.00591	6733
22907 7590 04/27/2011 BANNER & WITCOFF, LTD. 1100 13th STREET, N.W. SUITE 1200 WASHINGTON, DC 20005-4051				
EXAMINER				
WARE, DEBORAH K				
ART UNIT		PAPER NUMBER		
1651				
MAIL DATE		DELIVERY MODE		
04/27/2011		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/568,765

Applicant(s)

DANG ET AL.

Examiner

DEBORAH K. WARE

Art Unit

1651

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 13 April 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(g).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): _____.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: 16-24, 27 and 28

Claim(s) objected to: 25 and 26

Claim(s) rejected: 1-15, 25 and 26

Claim(s) withdrawn from consideration: None

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

/Deborah K. Ware/
DEBORAH K WARE
Primary Examiner
Art Unit: 1651

Continuation of 11, does NOT place the application in condition for allowance because: The Obviousness double patenting is sustained because the patented claims read on an anti-tumor agent of which the instant claims do read upon as well, albeit a different anti-tumor agent than disclosed in the Dang et al patent but the claims of the patent read broadly upon an anti-tumor agent nonetheless. Thus, although the Dang et al patent has been removed as prior art against the claims, the steps of the claimed method are substantially the same as instantly claimed herein. Note that the patented claims in the rejection for which claims 1-15 and 25-26 are deemed unpatentable over, are claims 1-5 and 20 of US Patent No. 7344710. These claims read broadly on an antitumor agent of which a microtubule stabilizing anti-tumor agent is an anti-tumor agent. Further, the steps of patented claims 1-2 do not necessarily exclude the presence or step of adding an anti-tumor agent when given their broadest interpretation. The rejection does not include those patented claims which read on microtubule destabilizer agents but only includes the claims drawn to the use of an anti-tumor agent. Also it is the claims of the patent upon which the rejection under obviousness double patenting is based upon and not the specification or prior art of the patent. Thus, even with the removal of the 103 rejection the patented claims remain the point of issue in this rejection and not the prior art. That being whether one of skill would have been motivated to administer *Clostridium novyi* and/or *Clostridium sordellii* spores and administer a microtubule stabilizing anti-tumor agent based upon patented claims 1-5 and 20 of US Patent No. 7344710 ('710). The Examiner thinks one of skill would have been motivated based upon the claims 1-5 and 20 of '710 because these claims teach the combination and the claims are broad enough in scope to not exclude microtubule stabilizing anti-tumor agents as claimed herein. Therefore, the only difference between the claims and the patented claims is a matter of scope even though the specification of '710 patent, teaches away from microtubule stabilizing anti-tumor agents, the patented claims 1-5 and 20 upon which the rejection is based do not. Thus, a terminal disclaimer is believed to be necessary to overcome the obviousness double patenting rejection since the only difference between the copending claims and the patented claims is a matter of scope. However, based upon the teachings in the specification of the instant case and the teachings of the '710 specification the 103 prior art rejection is removed and the scope rejection under 35 USC 112, first paragraph, is removed as well with the entry of the after final amendments.